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No. 93

In the Supreme Court of the United States

OCTOBER TERM, 1957

HENRY T. McKINNEY, PETITIONER

v.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM TO SUPPLEMENT (AFTER ARGUMENT) TO BRIEF FOR THE RAILROAD RESPONDENT

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At the oral argument of this case on January 27, 1958, respondent Missouri-Kansas-Texas Railroad Company requested and was given permission by the Court to file a supplement to its main brief. Respondent's supplement was filed with the Court on February 5, 1958. Petitioner respectfully submits the following memorandum in reply to respondent's supplemental brief and to respondent's letter of February 10, 1958, addressed to the Clerk of this Court, with respect to Rule 5 of the collective bargaining agreement between Missouri-Kansas-Texas Railroad Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

I

In this suit, petitioner seeks a Group I seniority date consistent with the statutory requirement that he be restored to his private employment "without loss of seniority." Universal Military Training and Service Act of 1951, § 9 (c) (1), 65 Stat. 75, 50 U. S. C. App. 459 (c) (1). Since petitioner's asserted right in this case is squarely based upon Section 9 (c) (1) of the Act, the Court is not confronted with the problem of whether Section 9 (c) (2), which represents a Congressional statement of the import of Section 9 (c) (1), is independently judicially enforceable under Section 9 (d). Section 9 (d) expressly confers jurisdiction on District Courts to enforce compliance with Section 9 (c) (1), the provision on which petitioner bases his claim. There can, therefore, be no serious question as to the jurisdiction of the District Court under the Universal Military Training and Service Act of 1951 in this case.[1] Consistent prior practice shows that the District Courts have jurisdiction; there have been a large number of "seniority" cases in this Court and the lower federal courts over the past decade. And because Congress has expressly conferred jurisdiction upon the District Courts to en-

[1] The purpose of the 1956 amendment to Section 9 (d) of the Act (70 Stat. 509), to which respondent refers (Supp. Br. pp. 17–18), was to assure that the re-employment and leave-of-absence rights conferred on reservists by Section 9 (g) of the Act are enforceable in the federal courts. See S. Rept. 2087, 84th Cong. 2d Sess. p. 3; H. Rept. 2401, 84th Cong., 2d Sess. p. 1. Cf. *Christner* v. *Poudre Ass'n*, 134 F. Supp. 115, affirmed, 235 F. 2d 946 (C. A. 10).

force the personal benefits accorded veterans by that Act, the earlier Railway Labor Act (44 Stat. 577; as amended, 45 U. S. C. 151, *et seq.*) should not be construed to deprive the veteran of this judicial remedy. *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630.

As to respondent's argument that petitioner's remedy falls within the exclusive jurisdiction of the National Railway Adjustment Board, established by the Railway Labor Act, the jurisdiction of the Board is confined to disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (45 U. S. C. 153 First (i)). The statutory jurisdiction of the Board does not extend to an adjustment of veterans' rights under the Universal Military Training and Service Act of 1951. For the enforcement of these rights, Congress has specifically conferred jurisdiction upon the District Courts. Moreover, the National Railroad Adjustment Board, in the past, has consistently refused to pass upon a claim presented by an individual when the individual is not represented by his collective bargaining agent. See, *Administrative Procedure in Government Agencies, Monographs*, S. Doc. No. 10, 77th Cong. 2d Sess., Part 4, pages 3–4, 7[2]; Lecht, *Experience under Railway*

[2] "Individual employees ordinarily first present their claims to their foremen or other immediate superiors. If the claims are granted, the case ends; if they are denied, the employee submits his case to his local union. If the local union rejects it, the case ends; [footnote omitted] otherwise, the representative of the local union takes up the question with the local superintendent of the carrier." *Administrative Procedure in Government Agencies, Ibid.* p. 3–4.

"* * * In some four hundred cases since the establishment of

Labor Legislation (1955), p. 169; see also *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 205–206; *Slocum* v. *Delaware, L. R. Co.*, 339 U. S. 239 at 245–254 (dissenting opinion); Cf. *Elgin J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 732–736.[3]

In considering whether petitioner should be required to take his claim before the Board, or whether the claim should be referred to the Board,[4] this Court may take note that petitioner's bargaining agent, the Brotherhood of Railway and Steamship Clerks,

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the Board individuals have sought to assert claims before the Board. With the exception of a few isolated cases of Division IV involving claims of individuals where there was no organization of the particular craft or class on the property, no case asserted by an individual has ever been decided on the merits by the Board. [Footnote omitted.] The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board." *Administrative Procedure in Government Agencies*, *Ibid.* p. 7.

[3] "Recently, Mr. H. E. Gilbert, President of the Brotherhood of Locomotive Firemen and Enginemen, opposed the naming of his labor organization as a respondent in a claim by an individual before the NRAB, saying: 'I believe the rule has been clearly established by earlier decisions that in the submission of a claim by an individual, a railway labor organization may not be designated as a party respondent in dispute with the individual.'" [Footnote] "Letter dated November 23, 1955, addressed to Mr. John M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board." Labor Law Journal, January, 1957, Vol. 8, No. 1, p. 11.

[4] "* * * Whether or not judicial power might be exerted to require the Adjustment Board to consider individual grievances, as to which we express no opinion, we cannot say that there is an administrative remedy available to petitioner or that resort to such proceedings in order to secure a possible administrative remedy, which is withheld or denied, is prerequisite to relief in equity." *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 at 205, 206.

Freight Handlers, Express and Station Employees, in both briefs and oral argument in this Court, has openly sided with the employer in opposition to the merits of petitioner's claim against the Railroad.[5] Thus, the possibility of the petitioner's obtaining union representation before the Board would seem to be remote at best, and, in view of the apparent practice of the Board in such circumstances, the fact well may be that the administrative machinery of the bipartite Board, chosen and compensated by groups of carriers and national unions (45 U. S. C. 153 First (a), (g)), would not, as a practical matter, be available to petitioner at all. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192; *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630.

II

By letter of February 10, 1958, the respondent Railroad advised the Clerk of this Court that Rule 5 of the collective bargaining agreement between the Missouri-Kansas-Texas Railroad Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees was not to be found in the original transcript on file with the Court. A complete copy of the collective bargaining agreement between respondents was attached to, and

[5] The concurrence of views presented by the employer and the Brotherhood in this case is by no means unique in the history of litigation arising out of the re-employment provisions of the various selective service acts since 1940. See, *e. g.*, respondents' briefs in *Diehl* v. *Lehigh Valley R. Co.*, No. 246, Oct. T., 1954, and *Oakley* v. *Louisville & N. R. Co.*, Nos. 28 and 29, Oct. T., 1949.

marked Exhibit "A", and made a part of petitioner's complaint filed in the District Court (R. 2), and was included in the record on file in the Court of Appeals. Only excerpts from this agreement (R. 5–9), not including Rule 5, were printed as part of the printed record in this Court, as well as in the Court of Appeals.

Rule 5 of the agreement provides as follows:

> APPLICATION—RULE 5.—Employees covered by these rules shall be in line for promotion. Promotions, assignments, and changes in force will be based upon seniority, fitness, and ability; fitness and ability being sufficient, seniority shall prevail. The appointing officer shall be the judge of fitness and ability, subject to appeal as provided in Rule 31.[1]

Counsel for petitioner referred to this rule at the oral argument of the case only by way of response to respondents' statements that the preference over non-employees, based on fitness and ability, accorded Group 2 employees by Rule 1 (3) (A) of the agreement, left to the Railroad complete discretion in filling Group 1 vacancies. Reference was made to Rule

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[1] As the Court was advised at the oral argument, Rule 5 is not reproduced in the printed record in this Court. As stated above, however, the complete collective bargaining agreement between respondents was attached to and is a part of the complaint filed in the District Court and a part of the record on file in the Court of Appeals. The complete agreement was not certified by the Court of Appeals as part of the record transmitted to this Court. The agreement is, in any event, on file as a matter of public record with the National Mediation Board, pursuant to the Railway Labor Act (45 U. S. C. 155, Third (e)).

5, not because it is immediately involved in this litigation, but merely to suggest that, if respondents' statements with respect to the preference accorded by Rule 1 (3) (A) were true, then a like statement could be made with respect to Rule 5, which concerns "promotions, assignments, and changes in force," and states that they, too, are based upon "fitness and ability."

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

FEBRUARY 1958.